IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.8 OF 2004

M/s.Kores (India) Limited,
a company incorporated under
the Companies Act, 1956 and
having its Registered Office
at Kores House, Plot No.10
of Dr.E. Moses Road at
Weoli, Mumbai 400 018 and
inter alia, factory at Ist
Pokhran Road, Thane 400 606 .. Appellants.

V/s.

Commissioner of Central
Excise, Thane-1, presently
having his office at 9th
floor, Piramal Chambers,
Lalbaug, Mumbai .. Respondent.

Mr.Vikram Nankani with Mr.Madhur Baya and Mr.P.K. Shetty for the appellants.

Mr.A.J. Rana, senior counsel with Mr.P.S. Jetly and Mr.Y.R. Mishra for the respondent.

CORAM : V.C. DAGA &
J.P. DEVADHAR, JJ.

DATED : 20TH DECEMBER, 2005.

ORAL JUDGMENT (PER J.P. DEVADHAR, J.) :

1. This appeal filed by M/s.Kores (India) Limited (hereinafter referred to as 'the assessee') under Section 35G of the Central Excise Act, 1944 (hereinafter referred to as 'the Excise Act') arising from the order of CEGAT dated July 8, 2003. By the said order, the CEGAT while setting aside the order

passed by the Commissioner of Central Excise (Appeals), held that the Assessing Officer was justified in ordering that the refund of Rs.63,89,743/- due to the assessee be credited to the Consumer Welfare Fund as per Section 11B(2) of the Excise Act.

2. The facts relevant for this appeal are that the assessee is engaged in the manufacture of excisable goods falling under Chapter 32, 38, 39, 48 and 96 of the Schedule to the Central Excise Tariff Act, 1944.

3. During the years 1992 to 1997, the assessee had cleared the goods manufactured by it on provisional assessment pending determination of the issue relating to deduction of various post manufacturing expenses / abatements from the wholesale price set out in the price lists / declarations. The Assistant Commissioner of Central Excise passed several adjudication orders during the period from January to March, 1997, thereby approving the price lists filed by the assessee during the period from 1992-1997. By the said adjudication orders, various deductions claimed by the assessee were disallowed. On appeal, the Commissioner of Central Excise (Appeals) set aside all those assessments and remanded the matter back to the

Assistant Commissioner of Central Excise for denovo consideration.

4. On remand, the Assistant Commissioner of Central Excise by a common order dated December 23, 1999 finally approved the classification lists filed by the assessee during the period from 1992-1997 by allowing the deductions as claimed by the assessee and directed that the assessments be finalised accordingly. As a result of allowing the deductions claimed by the assessee in the final assessment the assessee became entitled to refund of the excess provisional duty paid by the assessee. As per the directions contained in the assessment order, the assessee on April 4, 2000, filed refund claims seeking refund due to the assessee on finalisation of the provisional assessments.

5. The Assistant Commissioner of Central Excise issued a show cause notice on July 24, 2001 calling upon the assessee to show cause as to why the refund claim should not be rejected by applying the principles of unjust enrichment. The assessee, relying upon the decision of the Apex Court in the case of Mafatlal Industries Limited V/s. Union of India reported in 1997 (89) E.L.T. 247 (S.C.) submitted that the principles of unjust enrichment is not applicable to the present case. The assessee

further contended that the price charged to their customers was a cum duty price and, therefore, the entire duty incidence was borne by the assessee. By an order dated March 21, 2001, the Assistant Commissioner sanctioned refund amounting to Rs.63,87,743/-, however, directed that the said amount be credited to the Consumer Welfare Fund on the ground that the assessee failed to establish that the duty element has not been passed on to the customers.

6. On appeal filed by the assessee, the Commissioner of Central Excise (Appeals) by his order dated January 30, 2002 allowed the claim of the assessee on the ground that the prices of the assessee had remained constant despite change in the rate of duty and, therefore, it can be safely assumed that the incidence of duty has not been passed on to the customers. Accordingly, the Commissioner of Central Excise (Appeals) modified the order of the Assistant Commissioner and held that the refund which is relatable to the depot sales sanctioned by the Assistant Commissioner was not liable to be credited to the Consumer Welfare Fund and the same was liable to be granted to the assessee.

7. On further appeal filed by the Revenue, the CEGAT by its order dated July 8, 2003 allowed the

appeal of the Revenue by setting aside the order passed by the Commissioner of Central Excise (Appeals) and upholding the order passed by the adjudicating authority. Hence, this appeal at the instance of the assessee.

8. Mr.Nankani, learned counsel appearing on behalf of the assessee submitted two fold arguments. Firstly, he submitted that the principles of unjust enrichment contained in Section 11B of the Excise Act is not applicable to the refunds arising on finalisation of provisional assessments made during the period from 1992-1997. Secondly, even if it is held that the principles of unjust enrichment are applicable to the facts of the present case, the duty element has not been passed on to the customers and, therefore, the assessee is entitled to the refund.

9. As regards the first submission is concerned, in the present case, the provisional assessments made during the period 1992 to 1997 were finalised on December 23, 1999, that is after the amendment of Section 11B on August 1, 1998 and after the amendment of Rule 9B(5) on June 25, 1999. In the assessment order, the assessee was specifically directed to make an application for refund under Section 11B and, accordingly the assessee had made an application on April 4, 2000 claiming refund arising

on finalisation of provisional assessment. Having made the application for refund as per the assessment order, it is not open to the assessee to contend that the principles of unjust enrichment contained in Section 11B of the Excise Act are not applicable to the case of the assessee. Apart from that, in our judgment delivered today in Central Excise Appeal No.72 of 2004 [The Commissioner of Central Excise V/s. M/s.Standard Drum and Barrel Mfg. Co.], we have held that the refunds arising from finalisation of the provisional assessment after August 1, 1998 are governed by the principles of unjust enrichment contained in Section 11B of the Excise Act as amended by Act 21 of 1998. In the present case, refund accrued to the assessee on finalisation of provisional assessment on December 23, 1999 and the application claiming refund had been filed by the assessee on April 4, 2000 and, therefore, the said application is liable to be disposed off by applying the principles of unjust enrichment contained in Section 11B of the Excise Act as amended.

10. As regards the second submission made by the counsel for the assessee, in our opinion, the CEGAT was justified in holding that where the prices had remained the same even after the change in the rate of duty, it cannot be presumed that the duty has not been passed on, because, it is possible that while

keeping the price intact, the assessee may pass on the duty element by reducing the manufacturing cost or absorbing all but part of its profit. However, it was necessary to give an opportunity to the assessee to establish that the duty element has not been passed to the customer by reducing the manufacturing cost or sacrificing all or part of the profit.

11. In this view of the matter, we set aside the orders passed by the authorities below and remand the matter back to the Assistant Commissioner of Central Excise only for the limited purpose of ascertaining as to whether the refunds arising on finalisation of the provisional assessment have already been recovered by the assessee from the customers. The concerned Assistant Commissioner of Central Excise shall pass appropriate orders after giving an opportunity of hearing to the assessee, as expeditiously as possible, preferably within a period of six months from the date of the receipt of this order. It will be open to the assessee to adduce additional evidence, if any, in support of its contention that the duty element has not been passed on to the customers in respect of the goods cleared on provisional assessment during the period from 1992 to 1997.

11. The appeal is disposed off in the aforesaid

terms with no order as to costs.

(V.C. DAGA, J.)

(J.P. DEVADHAR, J.)